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No. 07-1376

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In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, SERGEANT JEFF BARRY, OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Petitioners,

v.

RODEL E. RODIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the mere act of passing a suspected counterfeit bill, by and of itself, furnish police officers with sufficient probable cause to arrest an individual pursuant to 18 U.S.C. § 472, even if the arresting officers have absolutely no evidence of any "intent to defraud" – an element required to prove a violation of the statute?

2. Are the officers who arrested Respondent for tendering a $100 bill, authentic by all indications but which had allegedly appeared suspicious-looking to the store personnel, entitled to qualified immunity even where the officers had no objective evidence that a crime pursuant to 18 U.S.C. § 472, or any other crime, had been committed, was being committed or was being attempted, and even where they knew Respondent on a personal basis and as a leading public figure in his ethnic community and in the general community?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 6

I. FACTUAL BACKGROUND 6

II. THE PROCEEDINGS BELOW 10

REASONS FOR DENYING THE PETITION 11

I. REVIEW IS NOT WARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OVER THE PROPER APPLICATION OF THE DOCTRINES OF PROBABLE CAUSE AND QUALIFIED IMMUNITY 11

II. REVIEW IS ALSO NOT WARRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OVER WHETHER PROBABLE CAUSE AS TO THE INTENT ELEMENT HAS TO FIRST BE PRESENT BEFORE AN INDIVIDUAL MAY BE ARRESTED FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472 15

TABLE OF CONTENTS – Continued

Page

A. Probable cause as to the intent element existed in the out-of-circuit cases cited by Petitioners 16

B. Probable cause as to the intent element existed in the Ninth Circuit cases cited by Petitioners 19

III. GRANTING THE PETITION AND THE CALENDARING OF THE CASE FOR ARGUMENT WITH *PEARSON* IS NOT WARRANTED BECAUSE *SAUCIER* AND *PEARSON* ARE COMPLETELY DISTINGUISHABLE FROM THE INSTANT CASE..... 23

IV. PUBLIC POLICY CONSIDERATIONS MILITATE STRONGLY AGAINST GRANTING THE PETITION..... 26

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baker v. McCollan, 443 U.S. 137 (1979) 14, 15

Bates v. U.S., 352 F.2d 399 (9th Cir. 1965) 22

Brinegar v. United States, 338 U.S. 160 (1949) 3, 11, 12

Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007) 24

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 12

Illinois v. Gates, 462 U.S. 213 (1983) 3, 11, 12

Locke v. United States, 7 Cranch 339 (1813) 11

Marks v. Carmody, 234 F.3d 1006 (7th Cir. 2000) 18

Maryland v. Pringle, 540 U.S. 366 (2003) 3, 12

U.S. v. Allison, 616 F.2d 779 (5th Cir. 1980) 18

U.S. v. Blum, 432 F.2d 250 (9th Cir. 1970) 21

U.S. v Ford, 461 F.2d 534 (9th Cir. 1972) 19, 20

U.S. v. Everett, 719 F.2d 1119 (11th Cir. 1983) 17, 20

U.S. v. Hernandez, 825 F.2d 846 (5th Cir. 1987) 17

U.S. v. Mayo, 394 F.3d 1271 (9th Cir. 2005) 22, 23

Ornelas v. United States, 517 U.S. 690 (1996) 12

Pearson v. Callahan, No. 07-751 ..... 3, 4, 23, 24, 25

Saucier v. Katz, 533 U.S. 194 (2001) 4, 24, 25

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES & CONSTITUTIONAL PROVISIONS

18 U.S.C. § 472 .....2, 4, 13, 15, 26

42 U.S.C. § 1983 .....1, 10

U.S. Const. amend. IV.....1, 3, 10, 15, 24, 29

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18 U.S.C. § 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

INTRODUCTION

In their petition, Petitioners contend that the Ninth Circuit erred in holding that "an officer may not arrest an individual on suspicion of passing a counterfeit bill unless the officer has evidence of 'intent to defraud' above and beyond the intent inferred from the passing of the bill." Petition ("Pet.") 3. Petitioners also claim that the appellate court's holding "creates a split with the Eleventh and Fifth Circuits, both of which have made clear that an attempt to pass a counterfeit bill is sufficient to establish a probable cause to arrest." *Id.* at 3-4. Petitioners further insist that "[e]very decision in existence at the time of the arrest had held or implied that officers may arrest an individual on suspicion of passing a counterfeit bill when the individual attempts to pass the bill, and that no additional evidence of intent to defraud is required to establish probable cause." *Id.* at 4. Lastly, Petitioners are asking this Court to grant

the writ and calendar the case for argument with *Pearson v. Callahan*, No. 07-751, allegedly because *Pearson* and Respondent's case are "virtually identical." *Id.* at 22 n.3.

Petitioners' contentions reflect a dark, worrisome and patently unreasonable interpretation of this country's deeply rooted laws, both constitutional and statutory. Fortunately for all Americans, Petitioners' claims are unmeritorious, unwarranted and simply wrong. The police are not entitled to qualified immunity in circumstances like the present case where they failed to conduct any investigation as to whether Respondent intended to pass counterfeit currency, chose to ignore an abundance of factual circumstances which, by all reasonable interpretations, indicated that Respondent did not intend to pass counterfeit currency, and yet still arrested Respondent.

Firstly, Petitioners overlook the factual contexts and the totality of circumstances in the in-circuit cases they cited, all of which are manifestly distinguishable from Respondent's case. Moreover, the appellate court's fact-bound analysis in Respondent's case and the ultimate decision it rendered was consistent with this Court's clearly enunciated holdings in cases involving the proper application of the doctrines of probable cause and qualified immunity. *See Maryland v. Pringle*, 540 U.S. 366 (2003); *Illinois v. Gates*, 462 U.S. 213 (1983); *Brinegar v. United States*, 338 U.S. 160 (1949). In keeping with the mandate of the Fourth Amendment, this Court has never derogated the need to satisfy probable cause as to the intent

element prior to effecting any type of arrest, and there is simply no compelling argument to make an exception when the matter involves suspected counterfeit currency.

Secondly, Petitioners' claim of conflict among the circuits is likewise illusory. There is no split among the circuits as to whether probable cause as to the intent element has to first be present before an individual may be arrested for suspected violation of 18 U.S.C. § 472. Again, even a cursory review of the factual background of the out-of-circuit cases Petitioners cited suggests that, unlike in Respondent's case, the arresting officers had reasonable bases before they effected the contested arrests, thereby satisfying probable cause as to the intent element.

Thirdly, Petitioners' attempt to use Respondent's case as a vehicle to insert themselves in the matter of *Pearson* is misguided. Even allowing for the possibility that Petitioners may have something of value to provide this Court in its deliberations on whether the holding in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled, Respondent's case differs so markedly with *Pearson* (or even *Saucier*) such that Petitioners' contention that they are "virtually identical" is very much a stretch. The simple fact of the matter is that, very much unlike the plaintiffs in *Pearson* and *Saucier*, Respondent, known to the officers at the time of his arrest to be an elected public official and a leading figure in his ethnic community and the general community, did nothing remotely unlawful except tender a bill acquired in the

regular stream of commerce to complete a regular purchase at the store where he was arrested.

Petitioners are urging this Court to disregard the law's requirement of them to exercise reasonableness in conducting an arrest and are asserting the defense of qualified immunity even where the arrest was completely unjustified under the circumstances. The doctrine of probable cause should not be diluted to the level asked for by Petitioners because permitting them to do so effectively turns the defense of qualified immunity into one of absolute immunity.

Lastly, the Court should not disturb the well-reasoned decision of the Ninth Circuit and deny Petitioners' petition for a writ of certiorari because there are compelling public policy reasons which are manifest and which militate strongly against ruling on behalf of Petitioners. Curbing possible police abuses in conducting seizures and arrests is one such public policy consideration; preventing an ordinary citizen from maliciously having a fellow citizen arrested on the pretext that the latter was passing what "appeared" to the former to be a counterfeit bill is another. Indeed, the ramifications of a ruling favorable to Petitioners are significant and untenable.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On February 17, 2003, Respondent performed the everyday action of paying in a retail store with U.S. currency when he attempted to purchase several items at his local Walgreens store with a $100 bill, 1985 series. The bill he used did not appear unusually old or wrinkled, and it had the normal texture of other $100 bills he had in his possession, all of which were genuine. Nonetheless, Walgreens' store manager Dennis Snopikov, after examining the bill with a counterfeit detector pen which indicated that the bill was genuine, called the San Francisco Police Department (SFPD) and reported that he had suspicions about a bill, that he was not sure but he thought it might be counterfeit.

When the first two SFPD police officers, Sgt. Jeff Barry and his partner, Officer Barbara Dullea, arrived at the scene, Sgt. Barry recognized the Respondent but made no attempt to approach either the Respondent or the Walgreens manager, who were engaged in a civil conversation. The officers then reported a Code 4, that the "situation was under control," to a second squad car, and waited at the door for the other officers to arrive. The officers in the second squad car, composed of Officers Michelle Liddicoet and James Nguyen, understood Code 4 to mean "suspect in custody" and expected to see the Respondent already in handcuffs upon their arrival. However, when they entered the Walgreens store,

Officers Liddicoet and Nguyen saw that the suspect was not in custody as earlier reported, so they proceeded to place handcuffs on Respondent.

Just before placing the handcuffs on the Respondent, Officer Nguyen spoke briefly with the Walgreens manager while Officer Liddicoet spoke with the Respondent. The Walgreens manager told Officer Nguyen that he had compared the $100 bill with a genuine bill, and that he was uncertain about the authenticity of the bill Respondent had used. The officers never looked at the "other" $100 bill which the Walgreens manager said he had compared it with, and which he said had a watermark and a magnetic security strip. They also never engaged in any investigation about whether Respondent had any intent to defraud Walgreens.

Although Sgt. Barry was the first to arrive and was the ranking officer at the scene, he told Officer Liddicoet not to mention his name in the police report. Aside from the fact that Sgt. Barry knew that Respondent was a lawyer and an elected member of the Community College Board of the City College of San Francisco (CCSF), Sgt. Barry also personally knew Respondent because Sgt. Barry headed the boys athletic program of the parochial school where Respondent's sons were enrolled and where their sons were classmates. The last time they spoke, Sgt. Barry had expressed negative feelings against Respondent, claiming that Respondent and the other members of the CCSF Board of Trustees had placed his brother-in-law, a police officer at CCSF, at risk for

physical harm because they did not allow CCSF police officers to carry firearms on campus.

When Officer Liddicoet arrived at the Walgreens store, Sgt. Barry informed Officer Liddicoet that Respondent was a lawyer, an elected public official, and that Respondent did not like police officers.[1] Officer Liddicoet thereafter entered the store and, after telling Respondent she knew who he was, told Respondent that he "should be ashamed" of himself, placed Respondent in handcuffs without ever making any effort to inspect the other $100 bill which the Walgreens manager had allegedly compared the suspected bill to, without inspecting a third $100 bill which Respondent had used to complete his purchase, and without inspecting any of the other bills Respondent may have had in his possession at the time.

Respondent was transported in the back of a squad car to a police station with his hands handcuffed behind his back and his knees pressed up. After arriving at the police station, Respondent was then put in a holding area with one of his wrists

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[1] Officer Liddicoet originally denied having been told anything by Sgt. Barry about Respondent. After cross-examination, she changed her testimony and admitted that Sgt. Barry had told her something about Respondent. In her revised testimony, however, she claims that he told her this only after Respondent was released. In view of her contradictory testimony and her conduct, it appears more likely that she was told these things (that Respondent dislikes police officers) when she arrived at the scene and that this was part of the reason Officer Liddicoet was in a rush to place the Respondent in handcuffs.

handcuffed to a metal bar, which significantly restrained his movement.

Needing assistance in ascertaining the genuineness of the bill, Officer Nguyen called the Secret Service but was unable to speak with an agent immediately, so he left a message requesting a return call. After about thirty minutes, a Secret Service agent returned the call, discussed the details of the suspected bill with Officer Nguyen, and concluded that the bill was in fact genuine.

Several more minutes later, Respondent was released from custody, and Officer Nguyen drove him back to Walgreens. At the time Respondent was released, Officer Nguyen admitted to Respondent that he knew all along that the bill was real, and that he told the other officers that he thought it was real.[2]

During the arrest, the drive to the police station in the back of the squad car, and the detention at the police station, Respondent suffered injuries to his back which required chiropractic care, injuries to his wrist, and emotional distress.

Shortly after the incident, the SFPD issued a formal memorandum which set forth specific procedures to be followed when investigating suspected

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[2] Sgt. Barry testified that he did not handle the bill himself and was 10-50 feet away from the officers handling the bill. Officer Liddicoet admitted at her deposition that the suspected bill actually looked real to her.

counterfeit currency incidents. The new policy now requires police officers to conduct an investigation into the element of intent before they can make an arrest.

II. THE PROCEEDINGS BELOW

On October 1, 2003, Respondent filed a complaint against the City and County of San Francisco, then Chief of Police Alex Fagan, Sgt. Barry and Officer Liddicoet under 42 U.S.C. Section 1983 for false arrest and excessive force in violation of Respondent's Fourth Amendment rights, conspiracy to violate said rights, injunctive relief, and several state law claims.

On February 11, 2005, Petitioners moved for summary judgment, and on March 22, 2005, the U.S. District Court for the Northern District of California granted the motion as to Respondent's conspiracy, municipal liability and injunctive relief claims, but denied the motion in all other respects after finding that, because the officers lacked evidence regarding Respondent's intent to defraud, probable cause was necessarily lacking and the arrest was therefore unlawful. The district court also found Sgt. Barry and Officer Liddicoet not entitled to qualified immunity because the illegality of the arrest was clearly established at the time. Petitioners' Appendix ("Pet. App.") 33; *see also* 2004 WL 326273 (N.D. Cal.).

On April 20, 2005, Petitioners appealed to the Court of Appeals, and on August 28, 2007, the Ninth Circuit, after hearing oral arguments from the parties,

affirmed the district court's decision. Pet. App. 1; *see also* 499 F.3d 1094 (9th Cir. 2007). On October 12, 2007, Petitioners filed a petition for the Ninth Circuit to rehear and rehear *en banc* its August 28, 2007 decision. The petition was denied on February 6, 2008. Pet. App. 51. The petition with this Court thereafter followed.

REASONS FOR DENYING THE PETITION

I. REVIEW IS NOT WARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OVER THE PROPER APPLICATION OF THE DOCTRINES OF PROBABLE CAUSE AND QUALIFIED IMMUNITY.

The doctrine of probable cause is grounded in a long history of case law. "As early as *Locke v. United States,* 7 Cranch 339, 348 (1813), Chief Justice Marshall observed: '[T]he term "probable cause" . . . imports a seizure made under circumstances which warrant suspicion.'" *Gates,* 462 U.S. at 235. This Court has repeatedly held that the "substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Brinegar*, 338 U.S. at 175. This commonsensical standard "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the

community's protection.'" *Pringle*, 540 U.S. at 370 (quoting *Brinegar*, 338 U.S. at 176).

"[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. The doctrine "deals with probabilities and *depends on the totality of circumstances*." *Pringle*, 540 U.S. at 371 (italics added). Thus, in determining whether an officer had probable cause to make an arrest, a court must "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

The doctrine of qualified immunity is similarly well-grounded in reasonableness. As clearly enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is designed to shield government agents from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Further, in *Harlow*, this Court ruled that "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by *a test that focuses on the objective legal reasonableness of an official's acts*." *Id.* at 819 (italics added).

The Ninth Circuit's analysis in Respondent's case involved the fact-bound application of well-settled law as briefly outlined above. After poring over the record, the appellate court concluded that "the circumstances surrounding Rodis's arrest fell *far short* of creating a 'fair probability' he had committed *any* crime, much less the crime in question." Pet. App. 9 (citation omitted). The court also noted that "[t]he record shows, and Defendants concede, they had no evidence whatsoever demonstrating that Rodis intended to use the bill to defraud the store, nor was there any reason to believe Rodis believed the bill was fake." *Id.* at 11. Further, the court pointed out:

> What is more, several facts known to the officers at the time of the arrest significantly *decreased* the probability that Rodis violated § 472. Viz., Rodis had other $100 bills in his possession that were genuine, one of which he used to complete the transaction; the counterfeit detector pen indicated the bill was genuine; and the officers knew Rodis was both a San Francisco attorney and a locally-elected public official with strong ties to the community in which the store was located. Specifically, Barry had known Rodis for several years. He knew Rodis was a member of the Community College Board, and he had interacted with Rodis personally, encountering him at activities associated with the elementary school that both Barry's and Rodis's children attended. Also, Rodis informed Liddicoet prior to his arrest that he was a public figure, and that he lived and

> worked within two blocks of the store. Liddicoet told him she knew who he was and that he "should be ashamed" of himself.

Id. at 12.

The Ninth Circuit also concluded that "even without the knowledge of Rodis's identity and local ties, based on the totality of the other relevant facts, no reasonable or prudent officer could have concluded that Rodis intentionally and knowingly used a counterfeit bill." *Id.* at 13. In effect, the police officers ignored all of the evidence indicating the Respondent did not intend to pass counterfeit currency and arrested him.

Despite these reasonable findings of the court, Petitioners insist that the Ninth Circuit decision is in tension with this Court's holding that "an officer is not required to investigate every claim of innocence and every potential defense 'such as lack of requisite intent' before making an arrest." Pet. 15. Only *Baker v. McCollan*, 443 U.S. 137 (1979), was cited by the Petitioners to this contention and no other Supreme Court case.

However, even in *Baker*, this Court never derogated the need to satisfy probable cause as to the intent element prior to effecting an arrest. In fact, there is no language in *Baker* that suggests that police officers are completely relieved of the need to have reasonable basis for probable cause as to the intent element; likewise, none of the cases cited by Petitioners hold that police officers can ignore the

abundant evidence of a person's innocence and still arrest said innocent person.

Moreover, the facts of *Baker* are hardly comparable to the instant case because *Baker* was a narrowly decided case of mistaken identity, in which the plaintiff was arrested because his brother, who had an outstanding warrant of arrest, had been masquerading as the plaintiff himself by using a duplicate of plaintiff's driver's license, identical to the original in every respect except that plaintiff's brother's picture graced it instead of the plaintiff's. *Baker*, 443 U.S. at 140. Hence, given the totality of circumstances in that case, the Court ruled that the plaintiff was detained pursuant to a warrant which conformed to the constitutional requirements of the Fourth Amendment. *Id.* at 144. Because the same cannot be reasonably said in the instant case, Petitioners did not have probable cause and therefore cannot be granted immunity from suit.

II. REVIEW IS ALSO NOT WARRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OVER WHETHER PROBABLE CAUSE AS TO THE INTENT ELEMENT HAS TO FIRST BE PRESENT BEFORE AN INDIVIDUAL MAY BE ARRESTED FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472.

Petitioners contend that this Court should grant review to resolve a conflict in the appellate courts on whether probable cause as to the intent element

is necessary in order to make an arrest. Pet. 13. Petitioners also claim that the Ninth Circuit's decision in Respondent's case conflicts with its "own past rulings, which have strongly implied that evidence of intent beyond the passing of the bill is not required for counterfeiting arrests." *Id.* at 14.

No such conflict exists, whether within the Ninth Circuit or among the circuits. What does exist is a consistent misreading of the holdings because Petitioners overlook the totalities of circumstances in each of the cases they cited, and in none of the cases cited by Petitioners was there an abundance of evidence, as in the present case, which indicated that the suspect did not have any intention to pass counterfeit currency.

A. Probable cause as to the intent element existed in the out-of-circuit cases cited by Petitioners.

A review of the out-of-circuit cases cited by Petitioners reveals that the factual contexts and the totalities of circumstances in these cases support the conclusion that probable cause as to the intent element in fact existed. Further, none of the cases cited by Petitioners set forth facts similar to the ones cited by the District Court in its opinion which pointed to the innocence of Respondent. Thus, Respondent's case is easily distinguishable from the cited cases, as follows:

(a) ***U.S. v. Everett***, 719 F.2d 1119 (11th Cir. 1983). Petitioners are pinning their argument strongly on this 1983 case where the defendant "appeals from judgments of conviction on four counts of conspiracy to pass counterfeit currency, passing counterfeit currency, possessing counterfeit currency, and concealing counterfeit currency." *Id.* at 1120. Here, the Eleventh Circuit did say that "[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause," but the opinion also mentioned that "appellant and another individual, who were seated at the same table in a lounge, each passed $50.00 *bills* which were *identified by a deputy sheriff to be counterfeit.*" *Id.* (italics added). Thus, even though the two-paragraph opinion is bereft of facts, it is reasonable to conclude that the appellate court, not wishing to disturb the judgments of conviction, simply deferred to the factual conclusions of the trial court and therefore did not see it necessary to elaborate any further. However, the plural word "bills," along with the conspiratorial impression that may be evoked in any reasonable person by witnessing two individuals each passing $50 bills in a lounge, plus the conclusive identification by the deputy sheriff of these bills to be counterfeit, distinguish *Everett* from Respondent's case.

(b) ***U.S. v. Hernandez,*** 825 F.2d 846 (5th Cir. 1987). In this case, the officers accosted Hernandez and his companion after being tipped off by a vendor in a carnival who earlier refused to change a $20 bill

he suspected of being counterfeit. *Id.* at 848. However, the officers had numerous reasonable bases for probable cause and effecting a subsequent arrest because (a) initially, "[a]s the officers approached, Hernandez and his companion started away"; (b) when one of the officers conducted a pat-down search, felt "a crumpled piece of paper" in Hernandez's pocket, and asked what it was, "Hernandez replied that it was nothing and twice refused to show the paper"; and (c) when the officer reached into the pocket, he "retrieved a black and white mimeograph copy of a twenty dollar bill." *Id.*

(c) ***U.S. v. Allison***, 616 F.2d 779 (5th Cir. 1980). The two arrestees in this case, Allison and Freedman, were also convicted of possession of counterfeit bills. *Id.* at 781. The Fifth Circuit pointed out that "[a]lthough mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed." *Id.* at 782. In its decision to affirm Allison's conviction, the court concluded that the police officer had probable cause to arrest because the arrestee exhibited not just one but three counterfeit $20 bills, and a subsequent search of his car's trunk yielded a travel shaving kit containing 117 counterfeit $20 bills. *Id.*

(d) ***Marks v. Carmody***, 234 F.3d 1006 (7th Cir. 2000). This case was not a case involving counterfeit currency; instead, it involved two competing travel

agency operators who decided initially to merge their operations but because of some disagreement involving unpaid tickets and commissions, ended up terminating the merger, with one party filing a criminal complaint against the other (Marks) for fraud stemming from Marks' issuance of checks returned for insufficient funds. *Id.* at 1007-1008. In Marks' suit against the officers who arrested him, the court ruled that "even though it was not prepared to hold that there was probable cause for the arrest, the two officers were entitled to qualified immunity on this record" because the arrest came after several months of investigation by the detective in this case who had his legitimate reasons to believe that there was indeed fraud involved and therefore reasonably thought arresting Marks was lawful. *Id.* at 1009.

B. Probable cause as to the intent element existed in the Ninth Circuit cases cited by Petitioners.

Petitioners' contention that the Ninth Circuit's own past rulings "have strongly implied that evidence of intent beyond the passing of the bill is not required for counterfeiting arrests" (Pet. 14) is similarly negated by the factual contexts and the totalities of circumstances in the circuit cases they cited which suggest that probable cause existed as to the intent element, as follows:

(a) ***U.S. v. Ford***, 461 F.2d 534 (9th Cir. 1972). This is another case of a defendant appealing a

conviction involving counterfeit currency, with the appellate court affirming the trial court judgment. The counterfeit bill fell out of defendant's clothing during a pat-down search for weapons after defendant, who "matched the storekeeper's description," was stopped by a cruising officer who responded to a storekeeper's report that defendant had earlier attempted to negotiate counterfeit currency. *Id.* Similar to their championing of *Everett*, Petitioners are pinning their interpretation of probable cause on this case because it is but a conclusory, two-paragraph opinion which, as the Ninth Circuit opinion in Respondent's case noted, "is so lacking in factual background, that what the panel deemed sufficient for probable cause is unknown." Pet. App. 17. However, even with the minimal facts in *Ford*, Respondent's case is distinguishable because the record reveals that, unlike in *Ford*, (1) the Walgreens manager who summoned the officers for assistance was simply uncertain about the authenticity of the bill; (2) at least two of the officers who responded at the scene thought the Respondent's bill in fact looked genuine; and (3) the officers knew Respondent personally and were aware that he was a lawyer and an elected public official. Further, none of the evidence in the *Ford* case tended to show the innocence of the person being arrested. Thus, to decide the questions presented before this Court in favor of Petitioners purely based on their interpretation of the two-paragraph opinion in *Ford* is to condemn the doctrine of probable cause to meaninglessness. It is difficult to imagine that the *Ford* court really meant this to be

so; if it were, all opinions after *Ford* involving counterfeit currency cases would all just consist of two conclusory paragraphs similarly devoid of other relevant facts and legal discussions.

(b) ***U.S. v. Blum***, 432 F.2d 250 (9th Cir. 1970). The defendant in this case was appealing a conviction after he was arrested without a warrant by a Louisiana State Trooper who had earlier heard a radio broadcast from the police captain of a small Louisiana town urging officers to be on the lookout for a white male driving a convertible with California plates and believed to have tendered counterfeit bills at a local gas station. *Id.* at 252. A subsequent search of defendant's vehicle resulted in the seizure of "a canvas bag containing about $15,000.00, a gun, ammunition, polo shirt, cap, glasses and a sock." *Id.* at 253. As the Ninth Circuit noted in the opinion, "*Blum* is easily distinguishable" from Respondent's because "numerous facts – such as the suspect fleeing the scene and the fact the suspect lived outside the state – could have been enough to create a 'fair probability' he passed counterfeit bills." Pet. App. 16 n.5. Additionally, the court noted that "*Blum* is an old case, and since it was decided (nearly forty years ago), we have made clear that (1) 'the key element of section 472 is the specific intent to defraud,' and (2) 'when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred.'" *Id.* (citations omitted).

(c) ***Bates v. U.S.***, 352 F.2d 399 (9th Cir. 1965). Bates was appealing the conviction of two counterfeiting counts but the Ninth Circuit affirmed after holding that the officer who had arrested Bates had probable cause because plaintiff's "automobile carried out-of-state license plates and was distinct in model and color," and "[t]he officer already had reliable information that the vehicle fitted the description of one which, very shortly before, had been entered by a person who had passed counterfeit money at a store in the near vicinity." *Id.* at 400. The court went on to say that "[o]f course, at the time of the arrest, the circumstances pointing to Bates as a participant in counterfeit transactions were not iron clad, but they certainly pointed an accusing finger at him – enough for probable cause." *Id.*

(d) ***U.S. v. Mayo***, 394 F.3d 1271 (9th Cir. 2005). In *Mayo*, the court ruled that the police, which found stolen mail in defendant's car, had reasonable bases to detain defendant for suspicion that he committed or participated in a crime because (a) there were earlier reports of suspicious activity, possibly involving narcotics, near the motel where defendant was arrested; (b) defendant was using a car with a stolen registration sticker on a license plate; (c) defendant tried to use someone else's credit card to rent a motel room; and (d) officers at the scene smelled chemical odor associated with methamphetamine. *Id.* at 1275-1276. However, Petitioners' reliance on this case is misplaced because in concluding that the arrest was constitutional, the court specifically reiterated

the standard for probable cause – i.e., "whether, under the totality of the circumstances, a prudent officer would have believed that there was a fair probability that the suspect committed a crime." *Id.* at 1276 (citation omitted).

In view of the above, a reasonable person, police officer or not, would find the totalities of the circumstances in the cases cited by Petitioners easily distinguishable from Respondent's case because the officers who arrested Respondent knew him, were aware of his standing in the community as an elected public official, and did not really have any factual basis to have any reasonable suspicion that he was trying to pass a counterfeit bill. Thus, in the absence of a concrete or mature conflict in the circuits, the question presented does not warrant this Court's review.

III. GRANTING THE PETITION AND THE CALENDARING OF THE CASE FOR ARGUMENT WITH *PEARSON* IS NOT WARRANTED BECAUSE *SAUCIER* AND *PEARSON* ARE COMPLETELY DISTINGUISHABLE FROM THE INSTANT CASE.

Petitioners are asking this Court to grant the petition and calendar the argument together with *Pearson* because they contend that "the qualified immunity issues presented by [*Pearson* and the instant case] are virtually identical." Pet. 22 n.3. However, this contention is without merit. In *Pearson*, the

plaintiff was a suspected drug pusher who was arrested by police officers inside his home without an arrest or search warrant after he supplied drugs to a confidential informant in exchange for a $100 bill which had earlier been marked by the police. The search of plaintiff and his home yielded a small bag of methamphetamine, the marked bill and drug syringes. The issue before the Tenth Circuit was whether the arresting officers were entitled to qualified immunity because of the Fourth Amendment's "consent-once-removed" doctrine which applies "when an undercover officer [broadened by other circuits to also include informants] enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." *Callahan v. Millard County*, 494 F.3d 891, 896 (10th Cir. 2007), rev'd sub nom. *Pearson v. Callahan*, No. 07-751 (2008).

In granting certiorari in *Pearson*, the Court directed the parties to argue the question of whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled. However, *Saucier* is likewise easily distinguishable from Respondent's case. The plaintiff in *Saucier*, the president of a group called "In Defense of Animals" who had earlier entered a military base with a protest banner concealed under his jacket, was rushed by military police officers when he "removed the banner from his jacket, started to unfold it and walked toward the fence and

the speakers' platform" where then-Vice President Al Gore was speaking. *Id.* at 197-198. He was subsequently taken to a military van, shoved or thrown inside, driven to and held at a military police station for a brief time, and then released. *Id.* at 198. He sued the military officers who arrested him, allegedly for excessive force. *Id.* at 199.

Clearly, the facts and circumstances in Respondent's case are totally different. Even without regard to the decisions reached by all the courts which tried the cases as well as the eventual decision of this Court, any reasonable person can sympathize with, and raise obvious and legitimate arguments in favor of, the arresting officers in both *Pearson* and *Saucier*. On the other hand, Respondent did not do anything remotely unlawful. Respondent's only fault for being arrested was for tendering a 1985 series $100 bill which he acquired in the regular stream of commerce and which in fact turned out to be genuine. The officers who responded to the scene knew Respondent to be a lawyer and a prominent figure in the city's political arena. They also knew him to be among the leading figures in his ethnic community, that he lived and worked in the immediate neighborhood of the store. They arrested him nonetheless after ignoring an abundance of evidence which tended to show that he did not intend to pass counterfeit currency.

It is clear from the record that Respondent in fact is the one who has probable cause for suspecting that there may have been other motivations for the conduct of at least one of the Petitioners. Respondent is

seeking to prove this and the Court should let the trial court proceed with its task and not allow Petitioners to hide behind the shield of qualified immunity. By invoking qualified immunity, Petitioners are effectively urging this Court to disregard the law's requirement of them to exercise commonsensical prudence and reasonableness. Thus, adopting Petitioners' interpretation of qualified immunity will effectively afford petitioners absolute immunity for arrests involving, at the very least, suspected violators of 18 U.S.C. § 472.

IV. PUBLIC POLICY CONSIDERATIONS MILITATE STRONGLY AGAINST GRANTING THE PETITION.

Section 472's language specifically contains the phrase "intent to defraud" as an element of the crime. The phrase is critical because it modifies several verbs that follow it, including "passes," "utters," "publishes," "sells," "attempts to pass," "keeps in possession," among others. 18 U.S.C. § 472. It is easy to see why evidence pertaining to this element should not be dispensed with in making arrests pursuant to the statute.

Petitioners, however, wish to diminish the importance of the phrase and argue that "[j]ust as a factfinder may infer from the fact that a person is driving a stolen vehicle that he did, in fact, steal the vehicle, a factfinder may infer from the fact that a person attempted to pass a counterfeit bill that he intended

to defraud the person to whom he passed the bill." Pet. 15 n.2. However, comparing the two acts – driving a stolen vehicle vs. attempting to pass a *suspected* (a modifier Petitioners consistently drop) counterfeit bill – is like comparing a dog to an ant; quite simply, the two are completely different animals.

Unlike the second act, the first act – driving a stolen vehicle – requires from a suspect a more creative imagination in order to come up with a reasonable excuse to a questioning police officer, and chances are, the police officer will have sufficient probable cause to make an arrest. After all, unlike bills, cars are not what one would consider fungible, disposable or indistinguishable from the others. Unlike bills which fit easily in wallets and pockets, cars are bulky and difficult to hide. Unlike bills, cars have glove compartments where proofs of purchase, registration papers and insurance are stored. And not to belabor the point, cars, though fast in the highways, cannot even compare with bills when the velocity at which the latter change hands in the regular course of business is taken into account.

And this is really where the crux of the difference lies: unlike a regular person who uses cash daily, a typical driver does not wake up and drive a different car each day. A typical driver does not have multiple cars which all look alike. A typical driver does not transact and/or exchange cars on a daily basis, whether with friends, family, vendors, banks, or machines like ATMs.

Respondent's case raises the question of whether it is acceptable for officers to arrest an individual purely because, in the conduct of his daily affairs, he acquired what to him was a regular bill (but apparently suspicious-looking to a store cashier) which he then used to complete a regular commercial transaction. It also raises the question of whether police officers can disregard circumstances which negate the possibility of any crime being committed by the suspect, arrest him purely on the aforementioned basis, and, in the process, dispense, maliciously, negligently, recklessly or otherwise, with the principles of reasonableness, probable cause and criminal intent.

The opinion of the Ninth Circuit zeroed in on this issue quite succinctly:

> Without at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking. To hold otherwise would render any individual vulnerable to arrest who unknowingly, through the normal stream of commerce, comes to possess or use a counterfeit bill, even if other circumstances suggest that a crime has not been committed. This is not and cannot be the law.

Pet. App. 13.

Thus, if validated by this Court, Petitioners' interpretation of the relevant law carries worrisome public policy implications. Counterfeit currency arrests will be fraught with risks of abuse by police

officers. It is also not difficult to imagine that an ordinary citizen knowledgeable about this particular application of the law may use his knowledge to get a fellow citizen arrested under the malicious pretext that the latter was passing what "appeared" to be a counterfeit bill. Indeed, this cannot and should not be the law.

Lastly, Petitioners' contention that the Ninth Circuit's holding "creates significant practical problems for enforcement of the counterfeiting laws" (Pet. 16) is exaggerated and the Court should not be persuaded for the simple reason that this contention is belied by the new SFPD policy issued shortly after the incident which now requires the officers investigating counterfeit currency incidents to conduct an investigation into the element of intent. The new SFPD policy is an implicit admission that conducting an investigation into the element of intent is in fact reasonable and conforms to the Fourth Amendment's constitutional protection against unreasonable searches and seizures.

CONCLUSION

Petitioners are wrong on the merits and have forwarded no persuasive argument for granting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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